COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	)	D.T.E. 01-31

APPEAL OF VERIZON MASSACHUSETTS
FROM HEARING OFFICER'S RULING
ON MOTION FOR CONFIDENTIAL TREATMENT

Pursuant to 220 CMR 1.06(6)(d)(2), Verizon Massachusetts ("Verizon MA") files this appeal of the Hearing Officer's ruling of July 19, 2001 on Verizon MA's Motion for Confidential Treatment (the "Memorandum").[1] The Hearing Officer abused her discretion in refusing to grant protective treatment of data that Verizon MA provided in response to DTE Set 2, Item No. 9, filed on June 5, 2001.[2] As shown below, the data qualify as "trade secret" or "confidential, competitively sensitive, proprietary information" under Massachusetts law and are entitled to protection from public disclosure in this proceeding.

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1 A copy of the Hearing Officer's Memorandum is appended as Attachment 1. In accordance with 220 CMR 1.06(6)(d)(3), Verizon MA also notified the Hearing Officer that the ruling would be appealed to the Department. This appeal is filed in accordance with the schedule established by the Hearing Officer. Memorandum at 3.

2 A copy of the response with the public version of the attachment is appended as Attachment 2.

I. BACKGROUND

On May 24, 2001, the Department served a set of data requests on Verizon MA to which Verizon MA responded on June 5, 2001. One of the questions, DTE–VZ 2-9, requested that Verizon MA provide documentation in support of statements in Verizon MA's direct testimony regarding the extent of competition in the Massachusetts resale market. The attachment to its response identifies, on a central office basis, the number of Verizon MA retail business lines, the number of resold business lines, and the percentage of resold lines to Verizon MA's business lines. In addition, Verizon MA's response further sets forth the names of resellers that had installed lines as of January 2001. Verizon MA requested confidential protection only for the information in the attachment that identifies the number of Verizon MA retail business lines and the number of resold business lines on an exchange basis. Verizon MA also agreed to make the entire response available to requesting parties, subject to the execution of a mutually acceptable protective agreement. No party filed an objection to Verizon MA's Motion.

In her Memorandum, the Hearing Officer denied Verizon MA's request. The Hearing Officer found that Verizon MA "failed to meet the second part of the [applicable] standard, i.e., that Verizon has failed to prove the need for non-disclosure."[3] In support of her conclusion, the Hearing Officer stated that Verizon MA provided "only conclusory statements that public disclosure of the number of Verizon retail business lines and resold business lines on an exchange basis could be used by competitors to

[3] Memorandum at 3.

Verizon's and the resellers' competitive disadvantage."[4] Verizon MA respectfully asserts that the Hearing Officer erred in denying the Motion for Confidential Treatment.

II. ARGUMENT

The Department's regulations allow the Hearing Officer discretion to conduct hearings and to make decisions with regard to procedural matters. 220 C.M.R. § 1.06(6)(a). However, that discretion is not unlimited and where, as in this case, the Hearing Officer has abused his or her discretion, the Department will overturn a Hearing Officer's ruling on procedural matters. This is such an instance. The Hearing Officer's denial of Verizon MA's Motion for Confidential Treatment should be overturned because she has made a ruling that is inconsistent with both the applicable legal standard and the Department's historical treatment of similar requests for protection of competitively sensitive, exchange-specific data.

In determining whether certain information qualifies as a "trade secret,"[5] Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;

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4 Memorandum at 3.

5 Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).[6]

As noted, the attachment to DTE 2-9 provides January 2001 data concerning the competitive activities of Verizon MA and resellers on an exchange-specific basis. In particular, the attachment identifies, on a central office basis, the number of Verizon MA retail business lines, the number of resold business lines, and the percentage of resold

[6] *See also, e.g., Hearing Officer's Ruling on Motions for Protective Treatment*, D.T.E. 99-105 (2000).

lines to Verizon MA business lines. It further identifies the 54 resellers that had installed lines as of January 2001.

The information for which Verizon MA is requesting protective treatment is compiled from internal databases that are not publicly available, is not shared with any non-Verizon employees for their personal use, and is not considered public information. Any dissemination of this information to non-Verizon employees, such as contracted service providers, is labeled as proprietary. Further, any non-Verizon employees who are working for Verizon and may have access to this information are under a non-disclosure obligation.

Verizon MA employees that have access to the market segment data are similarly subject to non-disclosure requirements. For example, employees who use this information during the course of their responsibilities are not permitted to publish the relevant data for general public use or release them for publication by others to the general public. Moreover, when these data are transferred internally they are transferred over a protected network and are marked proprietary. As explained below, public disclosure of the requested information could create a competitive disadvantage for Verizon MA and the relevant resellers, and be of value to other providers in developing competing market strategies.

The requested data represent valuable commercial information that competitors could use to frustrate Verizon MA and reseller efforts in the competitive market. For example, underscoring the confidential and competitively-sensitive nature of the data, Verizon MA sales and marketing personnel are *not* provided access to the reseller information contained in the attachment for the purpose of competing against other

providers. The data could be useful to Verizon MA retail representatives (and other competitors that seek to scrutinize Verizon MA's like proprietary information) by allowing them to know *which* exchanges warrant greater sales and marketing resources and, correspondingly, which may not. Disclosure of such information inappropriately tips the competitive balance by permitting competitors to target Verizon MA (and other competitors') customers to gain a competitive advantage in the marketplace that they otherwise would not enjoy. In balancing the public's "right to know" against the public interest in an effectively functioning competitive marketplace, the Department should continue to protect information that, if made public, would likely create a competitive disadvantage for the party complying with legitimate discovery requests.

In short, the information is not readily available to competitors and would be of value to them in developing competitive marketing strategies. Competitive disadvantage is likely to occur if the confidential information is made public – solely as a result of regulatory oversight.[7] The benefits of nondisclosure, and associated evidence of harm to Verizon MA (and the relevant resellers), outweigh the benefit of public disclosure in this instance. By releasing this information to the public, competitive companies will be able to determine characteristics of Verizon MA's market segments and will have the ability to utilize this information in developing offerings in particular exchanges in direct competition with Verizon MA. Historically, both the Department and the telecommunications industry have recognized such information to be confidential and appropriately subject to protection by order and the execution of

[7] If Verizon MA were not a regulated entity, the relevant information would not be available for public inspection.

reasonable nondisclosure agreements.[8] Nothing has changed in terms of law or circumstance that warrants an abandonment of that protection. Given the increasingly competitive telecommunications world, the Department should not now depart from its past practice and apply G.L. c. 25, § 5D to permit competitors to gain access to what is private, commercial information. Disclosure of the competitively sensitive material will undermine Verizon MA's ability to compete with other providers of like services that are not subject to equal public scrutiny.

III. CONCLUSION

For the reasons stated above, Verizon MA respectfully requests that the Department grant its Motion for Confidential Treatment of the proprietary portions of Verizon MA's response to DTE-VZ 2-9. As demonstrated above, the information is entitled to such protection, and no compelling need exists for public disclosure in this proceeding.

[8] The Hearing Officer stated that Verizon MA's Motion for Confidential Treatment contained only "conclusory statements" about the competitive harm associated with the release of the information. While Verizon MA disagrees with this characterization, the level of detail provided in the Motion is entirely consistent with the detail parties generally set forth in seeking to protect confidential information from public disclosure in Department proceedings. *See e.g.*, Attachments 3 and 4 which are motions filed by AT&T and WorldCom in D.T.E. 98-57. If the Department is to require a higher degree of proof in reviewing Motions for Confidential Treatment, it should provide parties with notice so that they may conform their actions accordingly.

Respectfully submitted,

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